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Nos. 04-104 and 04-105

In the Supreme Court of the United States

UNITED STATES OF AMERICA, PETITIONER

v.

FREDDIE J. BOOKER

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

UNITED STATES OF AMERICA, PETITIONER

v.

DUCAN FANFAN

ON WRIT OF CERTIORARI BEFORE JUDGMENT TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

REPLY BRIEF FOR THE UNITED STATES

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TABLE OF CONTENTS

		Page
I.	*Blakely* does not apply to the United States Sentencing Guidelines	2
	A. A fact that increases the Guidelines offense level does not increase the statutory maximum sentence	3
	B. This Court's decisions recognize the distinction between a fact that increases the statutory maximum sentence and a fact that increases the guidelines offense level	7
	C. If *Blakely* would require that the Guidelines offense level be treated as the statutory maximum sentence, that aspect of *Blakely* should be reconsidered	10
II.	The Guidelines cannot be applied as binding sentencing rules in cases where jury factfinding would be required	10
	A. The current Sentencing Guidelines system rests on a premise of judicial factfinding	12
	B. Requiring jury factfinding under the guidelines would invite—not avoid—serious constitutional doubt	17
	C. Employing the Guidelines as advisory in a limited class of cases is an appropriate remedy	19

TABLE OF AUTHORITIES

Cases:

Apprendi v. *New Jersey*, 530 U.S. 466 (2000)	6, 9, 18
Blakely v. *Washington*, 124 S. Ct. 2531 (2004)	2, 3, 5, 10
Edwards v. *United States*, 523 U.S. 511 (1998)	8
Harris v. *United States*, 536 U.S. 545 (2002)	6, 10
INS v. *Chadha*, 462 U.S. 919 (1983)	5
McKaskle v. *Wiggins*, 465 U.S. 168 (1984)	11

Cases—Continued:

	Page
Mistretta v. *United States*, 488 U.S. 361 (1989)	2, 3, 4, 5, 9, 18, 19
Patterson v. *New York*, 432 U.S. 197 (1977)	14
Regan v. *Time, Inc.*, 468 U.S. 641 (1984)	20
Rogers v. *Tennessee*, 532 U.S. 451 (2001)	16
Sabri v. *United States*, 124 S. Ct. 1941 (2004)	20
Tilton v. *Richardson*, 403 U.S. 672 (1971)	14
United States, In re, 194 U.S. 194 (1904)	11
United States v. *Dunnigan*, 507 U.S. 87 (1993)	4, 8
United States v. *Emmenegger*, 329 F. Supp. 2d 416 (S.D.N.Y. 2004)	4, 8
United States v. *Hammoud*, 2004 WL 2005622 (4th Cir. Sept. 8, 2004)	10
United States v. *Hudson*, 11 U.S. (7 Cranch) 32 (1812)	1, 18
United States v. *Jackson*, 390 U.S. 570 (1968)	15
United States v. *Medas*, 323 F. Supp. 2d 436 (E.D.N.Y. 2004)	15
United States v. *Watts*, 519 U.S. 148 (1997)	8
Witte v. *United States*, 515 U.S. 389 (1995)	4, 8, 13

Constitution, statutes and rules:

U.S. Const.:	
Art. I	15
§ 7, Cl. 2	5
§ 9, Cl. 3 (Ex Post Facto Clause) (federal)	16
§ 10, Cl. 1 (Ex Post Facto Clause) (state)	16
Art. III	18
Amend. V (Double Jeopardy Clause)	7
Amend. VI	1, 2, 3, 4, 6, 7, 15, 16, 19
Federal Judiciary Protection Act of 2002, Pub. L. No. 107-273, § 11009(d), 116 Stat. 1820-1821	7
PROTECT Act, Pub. L. No. 108-21, 117 Stat. 650	5
§ 401(b), 117 Stat. 668-669	5
§ 401(d), 117 Stat. 670-671	5
§ 401(g), 117 Stat. 671-672	5

Statutes and rules—Continued:

	Page
§ 401(m), 117 Stat. 675	5
§ 401(n)(1), 117 Stat. 676	5
Sentencing Reform Act of 1984, Pub. L. No. 98-473, 98 Stat. 1987 (18 U.S.C. 3551 *et seq.*):	
18 U.S.C. 3553(a)(2)(A)	16
18 U.S.C. 3553(b)	13
Violent Crime Control and Law Enforcement Act of 1994, Pub. L. No. 103-322, 108 Stat. 1796:	
§ 80001(b), 108 Stat. 1986	6
§ 240002, 108 Stat. 2081	7
18 U.S.C. 2113(a)	1, 2
18 U.S.C. 3593(b)	17
18 U.S.C. 3624(b)	12
21 U.S.C. 841(b)	17
28 U.S.C. 991(a)	3, 6
28 U.S.C. 994(a)(1)	11
28 U.S.C. 994(p)	5
Fed. R. Crim. P. 35(b) (1983)	12
United States Sentencing Guidelines:	
§ 1A1.1 editorial note (A)(3)	13
§ 2B3.1	2
§ 3A1.1(b)	2
§ 3E1.1	15
Ch. 5, Pt. A (Sentencing Table)	2
App. C	7

Miscellaneous:

<http://www.ussc.gov/general/commbios99.htm>	6
<http://www.ussc.gov/general/Oldcomms.htm>	6
S. Rep. No. 225, 98th Cong., 1st Sess. (1983)	11
United States Sentencing Comm'n:	
Supplementary Report on the Initial Sentencing Guidelines and Policy Statements (June 18, 1987)	17
2002 Sourcebook of Federal Sentencing Statistics	14

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Through this nation's history, Congress has established the penalties for crimes and the elements that trigger those penalties. See *United States* v. *Hudson*, 11 U.S. (7 Cranch) 32, 34 (1812). Thus, historically, for a bank robbery offense, the elements were defined by statute, 18 U.S.C. 2113(a), and a judge could have sentenced a defendant to a term of imprisonment up to the 20-year maximum set forth in that sta-

tute, taking into account whatever facts the judge deemed relevant—including whether the defendant may have been responsible for a string of robberies, whether the defendant endangered a child in the bank, or whether the defendant exhibited bad character worthy of longer punishment by lying on the witness stand. The Sixth Amendment had no role in regulating those findings, no matter how critical they were to the sentence imposed.

When Congress directed the Sentencing Commission, a body in the Judicial Branch, *Mistretta* v. *United States*, 488 U.S. 361 (1989), to regularize judicial sentencing practices, it did not change the statutory maximum. But the judge's discretion is now cabined by the Sentencing Guidelines, which require him to consider factors such as whether a firearm was brandished or discharged; whether any victim sustained bodily injury or serious bodily injury; and whether the crime involved a particularly vulnerable victim. Guidelines §§ 2B3.1, 3A1.1(b). The judge then determines a sentence within a range that is usually far below the 20-year statutory maximum. In respondents' view, however, the *real* "statutory maximum" for bank robbery is now 41 months for a first offender (base offense level of 20, criminal history category I, see Guidelines § 2B3.1; *id.* Ch. 5, Pt. A (Sentencing Table)), and the Sixth Amendment now guarantees the defendant a right to jury trial on any fact that raises that 41-month cap. There is nothing in the Sixth Amendment that transforms the statutory maximum from the 20 years set forth in Section 2113(a) of Title 18 of the United States Code to 41 months, or equates the work product of the Commission with the statutes enacted by Congress.

I. *BLAKELY* DOES NOT APPLY TO THE UNITED STATES SENTENCING GUIDELINES

Respondents and their amici acknowledge that *Blakely* v. *Washington*, 124 S. Ct. 2531 (2004), and the cases on which it rests, applied a Sixth Amendment rule that determines which of two competing *statutes* defines the "relevant 'statutory maximum'" for a particular crime. *Id.* at 2537. Despite the fact that the Sentencing Guidelines are not statutes—but are instead sentencing rules promulgated by a body in the judicial branch, designed to channel the historic discretion of federal sentencing judges—respondents contend that *Blakely*'s rule should be extended to the Guidelines to avoid elevating form over substance. Fanfan Br. 13; Booker Br. 11. Respondents also contend that, even if the origin of the Guidelines mattered, Congress exerts sufficient control over the Guidelines to invest them with a legislative character. Fanfan Br. 15-18; Booker Br. 20-25. Those propositions are at odds with a central premise of at least four of this Court's decisions describing the interrelationship of the Guidelines and the statutes that define criminal offenses and establish maximum punishments. U.S. Br. 32-38. Respondents' propositions are also inconsistent with a critical premise of the decision upholding the constitutionality of the Sentencing Commission: that the Commission does not "enlist the resources or reputation of the Judicial Branch in * * * the legislative business of determining what conduct should be criminalized," *Mistretta*, 488 U.S. at 407, but instead promulgates rules "for the exercise of the Judicial Branch's own business—that of passing sentence on every criminal defendant," *id.* at 408. Respondents' effort to extend *Blakely* to the Guidelines, with the effect of invalidating that sentencing system, a body of this Court's precedent, and the foundations of *Mistretta*, is unsound and should be rejected.

A. A Fact That Increases The Guidelines Offense Level Does Not Increase The Statutory Maximum Sentence

As the government explained in its opening brief (at 20-32), the Sentencing Guidelines are distinct from statutes that increase a maximum sentence based on the finding of a particular fact. First, as this Court recognized in *Mistretta*, the Sentencing Commission is not a legislature and does not exercise legislative functions; it is "an independent commission in the judicial branch," 28 U.S.C. 991(a), whose functions

are "attendant to a central element" of that branch's "historically acknowledged mission," *Mistretta*, 488 U.S. at 391, of deciding "what sentence" within the range set by Congress "is appropriate to what criminal conduct under what circumstances," *id.* at 395. Second, as Judge Lynch has observed, the Guidelines do not "divide crimes into narrow degrees and standard categories," but instead "provide a methodology for assessing the seriousness of different instances of crime, quite separate from the elements of any particular statutory crime." *United States* v. *Emmenegger*, 329 F. Supp. 2d 416, 435 (S.D.N.Y. 2004). Those features of the Guidelines establish that they are a means of channeling the discretion of sentencing judges to impose a sentence within a legislatively established range—not an exotic and constitutionally problematic administrative system for redefining the "elements" of crimes.

1. Respondents and a number of amici contend (Booker Br. 26; Fanfan Br. 19; FAMM Br. 9; NYCDL Br. 14-15; WLF Br. 3, 7-8) that facts that increase a Guidelines offense level are materially different from sentence-enhancing facts under the pre-Guidelines regime—which all agree could be found by judges without infringing the Sixth Amendment—because facts found under the pre-Guidelines regime did "not pertain to whether the defendant has a legal *right* to a lesser sentence," *Blakely*, 124 S. Ct. at 2540. But rigor and predictability do not somehow transform judicial sentencing rules into statutory maxima. Indeed, in other contexts, this Court has repeatedly rejected the contention that the relative rigor of judicial sentencing under the Guidelines compared to the pre-Guidelines system makes a constitutional difference. See, *e.g.*, *Witte* v. *United States*, 515 U.S. 389, 402 (1995); *United States* v. *Dunnigan*, 507 U.S. 87, 98 (1993).

Congress, in lieu of creating the Commission, could have required district judges to participate in "sentencing councils" in an effort to regularize judicial practices and could have authorized appellate review to ensure that sentences were consistent with the work of the councils, all without

Sixth Amendment difficulty. U.S. Br. 23-24. If, under such a hypothesized system, a court of appeals held, for example, that a first-time offender who acted as a courier in a cocaine distribution conspiracy, carried a small amount of the drug, and had no other involvement in the offense, should not receive a prison term of more than five years, a defendant of that type who received a longer prison term would have "a legal *right* to a lesser sentence," *Blakely*, 124 S. Ct. at 2540, enforceable through appellate review. Such a regime would not violate the Sixth Amendment, however, because it would be the product of judges engaged in their "historically acknowledged mission." *Mistretta*, 488 U.S. at 391. Indeed, one of respondents' amici appears to agree that there could be no Sixth Amendment objection to a system of appellate review that gave rise to "a common law of sentencing." FAMM Br. 28, 30.

2. Echoing the view of Booker and many of respondents' amici, Fanfan contends that Congress has always had "direct influence over the substance of the Guidelines" (Br. 25), and that the PROTECT Act, Pub. L. No. 108-21, 117 Stat. 650, "further consolidated congressional control" over them (Br. 23-24). But the Commission's guidelines, which like judicially-promulgated procedural rules are subject to a delayed effective date after submission to Congress, 28 U.S.C. 994(p), and can be "revoke[d] or amend[ed]" by Congress at any time, *Mistretta*, 488 U.S. at 393-394, do not constitute "laws." The enactment of legislation can be accomplished only through the procedures specified in Article I, Section 7, Clause 2 of the Constitution. *INS* v. *Chadha*, 462 U.S. 919, 944-951 (1983). Congress's "influence" over the Guidelines does not convert them from sentencing rules promulgated by a body in the judicial branch, see *Mistretta*, 488 U.S. at 395, into the equivalent of aggravated crimes (which Congress has never passed into law).

Nor does the PROTECT Act have that effect. The sentencing provisions of that law dealt largely with *downward* adjustments and departures, see Pub. L. No. 108-21,

§ 401(b), (d), (g), and (m), 117 Stat. 668-672, 675, which do not implicate Sixth Amendment concerns, see *Apprendi* v. *New Jersey*, 530 U.S. 466, 490 n.16 (2000); *Harris* v. *United States*, 536 U.S. 545, 565 (2002) (plurality opinion). Contrary to the contention of respondents and a number of their amici (Booker Br. 20; Fanfan Br. 24; FAMM Br. 18; NACDL Br. 16; NYCDL Br. 8 n.3; WLF Br. 5), the PROTECT Act's amendment of 28 U.S.C. 991(a) to provide that "[n]ot more than 3" (instead of "[a]t least 3") members of the Sentencing Commission shall be federal judges, Pub. L. No. 108-21, § 401(n)(1), 117 Stat. 676, does not alter the validity or continuing significance of this Court's conclusion in *Mistretta* that the Commission's function "has been and remains appropriate to the Judicial Branch," 488 U.S. at 396. The *Mistretta* decision suggested that a variety of institutions closely related to the mission of the judicial branch are constitutionally unproblematic even though some were comprised "of nonjudges only." *Id.* at 389. In any event, the Commission now includes three federal judges, the same as when *Mistretta* was decided. Compare http://www.ussc.gov/general/commbios99.htm with http://www.ussc.gov/general/Oldcomms.htm. Accordingly, Fanfan's suggestion that it might someday "include *no* judges whatsoever" (Br. 24) is purely speculative.

The evidence offered by amicus National Association of Criminal Defense Lawyers (NACDL) to support its charge of longstanding and "substantial legislative interference" with the Commission's work (Br. 12) does not accurately reflect either the extent of Congress's direct amendment of the Guidelines or the relevance of its amendments to the issue in these cases. Of the 69 "congressional directives" listed in the appendix to amicus NACDL's brief, a number involved downward adjustments or departures, see, *e.g.*, Pub. L. No. 103-322, § 80001(b), 108 Stat. 1986, and thus do not implicate the Sixth Amendment. Many of the others merely directed the Commission to review particular guidelines and amend them "as appropriate," sometimes offering a

statement of "Congress's sense" of an appropriate revision and sometimes not. See, *e.g.*, Pub. L. No. 107-273, § 11009(d), 116 Stat. 1820-1821. Even when Congress did suggest specific changes, the Commission was not bound by the suggestion.[1] Indeed, of the 662 amendments adopted since the Guidelines went into effect, it appears that only 18 involve base offense levels or upward adjustments specifically mandated by Congress. See Guidelines App. C amends. 134, 135, 141, 203, 363, 364, 370, 436, 521, 537, 538, 543, 544, 555, 576, 608, 649, 650. And none of those amendments is at issue here. Booker's acknowledgment that "*most* of the guideline provisions are of administrative rather than legislative origin" (Br. 18) is thus a considerable understatement.

B. This Court's Decisions Recognize The Distinction Between A Fact That Increases The Statutory Maximum Sentence And A Fact That Increases The Guidelines Offense Level

1. As the government explained in its opening brief (at 32-38), this Court has on four occasions affirmed Guidelines sentences that had been increased on the basis of a fact that the district court found to have been proved by a preponderance of the evidence. Respondents point out (Booker Br. 23-25; Fanfan Br. 25-26) that none of those decisions squarely addressed the question whether, under the Sixth Amendment, a fact that increases a defendant's offense level must be found by the jury based on proof beyond a reasonable doubt. The government explicitly acknowledged as much in its opening brief (at 32). The decisions are nevertheless critically important to the issue in these cases. First, the decisions endorse the proposition that the United States Code, rather than the Guidelines Manual, establishes maxi-

[1] For example, after Congress directed the Commission to ensure that Guidelines ranges for crimes of violence against elderly victims were "sufficiently stringent" and suggested an enhancement for repeat offenders, Pub. L. No. 103-322, § 240002, 108 Stat. 2081, the Commission reviewed the applicable Guideline and concluded that the current penalties "generally appear[ed] appropriate," Guidelines App. C amend. 521.

mum sentences, and they treat sentence-enhancing facts under the Guidelines as analytically equivalent to sentence-enhancing facts under the pre-Guidelines regime. Indeed, the majority in *United States* v. *Watts*, 519 U.S. 148 (1997) (per curiam), was unmoved by Justice Stevens' dissent, even though it embraced the precise relationship between the Guidelines and the Code that respondents suggest and argued that the flaw in Watts's sentence was solely the failure to require proof beyond a reasonable doubt. *Id.* at 162 & n.2, 166 & n.4, 169. Second, as one of respondents' own amici recognizes (FAMM Br. 17 n.11), if *Blakely* were held to apply to the Guidelines, each of those four Guidelines decisions would no longer be good law.[2]

Thus, even if applying *Blakely* to the Guidelines would not technically "overrule" the four decisions of this Court, it hardly follows that the Court should disregard the fact that, as Judge Lynch has observed, those decisions "affirmed sentences that would appear to present the very concerns that [respondents] now argue invalidate the Guidelines." *Emmenegger*, 329 F. Supp. 2d at 429. Respondents contend that

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[2] *United States* v. *Dunnigan*, 507 U.S. 87 (1993), which holds that a defendant's offense level can be increased on the basis of trial perjury, would no longer be law because it would be impossible for the government to charge in the indictment and prove at trial that the defendant did something that he had not yet done. *Witte* v. *United States*, 515 U.S. 389 (1995), which holds that there is no double-jeopardy bar to prosecuting a defendant for a drug transaction used to increase his offense level in an earlier prosecution, would no longer be law because the drug transaction would likely be considered a lesser included offense of the earlier prosecuted offense and the Double Jeopardy Clause prohibits a prosecution for a lesser included offense after a prosecution for the greater one. *Watts*, which holds that a defendant's offense level can be increased on the basis of conduct of which he was acquitted, would no longer be law for the obvious reason that the jury in a case like that one has affirmatively declined to find that the sentence-enhancing conduct in question was proved beyond a reasonable doubt. And *Edwards* v. *United States*, 523 U.S. 511 (1998), which holds that drug quantity may be found by the sentencing judge, would no longer be law for the obvious reason that, as a sentence-enhancing fact, drug quantity would have to be found by the jury.

the logic of *Blakely* requires that sentence-enhancing facts under the Guidelines be found by the jury, but the logic of *Dunnigan*, *Watts*, *Witte*, and *Edwards* compels the opposite conclusion, and *Blakely* did not address the question presented in this case anymore than they did. See *Blakely*, 124 S. Ct. at 2538 n.9.

2. A holding that *Blakely* applies to the Guidelines not only would mean that *Dunnigan*, *Witte*, *Watts*, and *Edwards* are no longer good law; as the government pointed out in its opening brief (at 38), it would also call into question *Mistretta* itself. Disagreeing with that view, amicus Families Against Mandatory Minimums points out (Br. 15-17) that *Mistretta* did not involve a Sixth Amendment issue. Cf. Fanfan Br. 38-40. The implications for *Mistretta*, however, cannot so easily be dismissed.

If *Blakely* applies to the Guidelines, any fact that increased a defendant's offense level would be an element, or at least the "functional equivalent" of an element, of a greater offense. See *Apprendi*, 530 U.S. at 494 n.19. In other words, for constitutional purposes, the enhancing Guidelines fact would become an essential element of an aggravated crime. That, in turn, would mean that the Sentencing Commission sets the maximum penalty for the simplest form of virtually every offense defined by Congress, and that it both defines and sets the maximum penalty for dozens (and in some cases hundreds) of aggravated forms of that offense. If that is what the Commission does, then, contrary the Court's premise in rejecting a separation-of-powers challenge to the Guidelines in *Mistretta*, it would appear that the Commission *is* engaged in the "business of determining what conduct should be criminalized," *Mistretta*, 488 U.S. at 407, and that it *does* establish "maximum penalties for every crime," *id.* at 396. As the en banc Fourth Circuit has put it: "*Mistretta* * * * rejected a constitutional challenge to the guidelines on the basis that the Sentencing Commission performs not a legislative function, but a judicial one. Application of *Blakely* to the guidelines * * * would require a

conclusion that the Sentencing Commission performs not a judicial function, but a legislative one." *United States* v. *Hammoud*, 2004 WL 2005622, at *26 (Sept. 8, 2004).

C. If *Blakely* Would Require That The Guidelines Offense Level Be Treated As The Statutory Maximum Sentence, That Aspect Of *Blakely* Should Be Reconsidered

The government argued in its opening brief (at 39-43) that, if *Blakely* did not merely apply *Apprendi* but instead "redefined 'statutory maximum,'" 04-104 Pet. App. 10a, to mean "the upper bound on a judge's sentencing discretion," *Blakely*, 124 S. Ct. at 2546 (O'Connor, J., dissenting), then the decision should to that extent be reconsidered. The government pointed out (Br. 39-40) that *Blakely* offered no direct historical support for broadening the definition of "element" from a fact that increases the statutory degree of the offense to a fact that raises the upper limit on the discretion of the trial court to sentence within statutory limits. Respondents and their amici do not offer any historical support either. Instead, one of the respondents faults the government for "offer[ing] no historical analysis of its own." Booker Br. 22 n.10. That criticism misses the point, which is that there *is* no historical evidence on the question (because structured sentencing did not exist when the Bill of Rights was adopted), and that, in the absence of any such evidence, or a clear textual command (which is also absent), there is no warrant for the Court to second-guess the judgment of Congress and the Commission that a fact that increases a sentence within the statutory range may be found by the judge rather than the jury. See *Harris* v. *United States*, 536 U.S. at 560 (plurality opinion).

II. THE GUIDELINES CANNOT BE APPLIED AS BINDING SENTENCING RULES IN CASES WHERE JURY FACTFINDING WOULD BE REQUIRED

If this Court holds that *Blakely* applies to the Guidelines, it must determine which parts of the federal sentencing

scheme remain in force. Respondents' proposal—to have this Court declare that the Guidelines will operate with new *Blakely*-mandated procedures—would require rewriting the statute to make "sentencing court" mean "jury," and would treat the Guidelines exactly as if they provided elements and statutory maxima of never-enacted federal crimes. While respondents argue (Booker Br. 33 n.19; Fanfan Br. 31 n.11) that the provision in 28 U.S.C. 994(a)(1) that the Guidelines be directed to the "sentencing court" does not constitute a directive that judges, not juries, be responsible for Guidelines application, it is perfectly clear that, in the context of 28 U.S.C. 994(a)(1), Congress was expressing its intention to regularize the process of *judicial* sentencing, not to work a fundamental restructuring of the role of judge and jury at sentencing. The statutory language ("sentencing court") reflects that choice. As this Court has noted, "[m]any cases may be found in which the words 'court' and 'judge' were held to have been used interchangeably," *In re United States*, 194 U.S. 194, 196 (1904), while the term "court" is frequently used in contradistinction to "jury," see, *e.g.*, *McKaskle* v. *Wiggins*, 465 U.S. 168, 183 (1984) (referring to counsel's appearance "before the court or jury"). The legislative history confirms the logical understanding of the text. See S. Rep. No. 225, 98th Cong., 1st Sess. 51 (1983) ("[t]he sentencing guidelines system * * * will guide the judge in making his decision on the appropriate sentence"); U.S. Br. 48-49.

Attempting to apply the Sentencing Guidelines while requiring jury verdicts on sentence-enhancing facts would produce a distorted and unmanageable system that would regularly produce sentences that were not proportional to the offense of conviction, failed to recognize important differences between defendants, and failed to operate in a consistent manner. Such a system was not adopted by Congress or the Sentencing Commission. And, critically, the resulting scheme would itself be subject to grave constitutional doubts, because treating Guidelines factors as elements of

offenses and the upper bounds of Guidelines' ranges as statutory maxima would undermine an essential premise of *Mistretta*, *i.e.*, that Congress had *not* delegated to the Sentencing Commission the authority to define federal criminal offenses.

A. The Current Sentencing Guidelines System Rests On A Premise Of Judicial Factfinding

Respondents correctly identify the goals of the Sentencing Reform Act as proportionality, uniformity, and honesty in sentencing. See Fanfan Br. 28-29; Booker Br. 28. They argue that "[n]one of the three goals * * * depends upon the identity of the factfinder or the burden of persuasion," Fanfan Br. 29, and that therefore "the Guidelines can easily be squared with the Sixth Amendment" by transferring to juries the responsibility for finding sentence-enhancing facts, *id.* at 31.[3]

The remedial question in this case, however, is not whether Congress *could* construct a constitutional determinate sentencing regime based on jury factfinding. See Booker Br. 38. Rather, the remedial question in this case is whether this Court, after striking down the sentencing scheme Congress and the Commission in fact created, can conclude that the *current* statute and the *current* Guidelines, with a judicially imposed overlay of jury factfinding on sentence-enhancing facts, would produce a manageable, constitutionally valid system that can be understood to reflect

[3] Respondents are correct that the goal of "honesty" was accomplished by abolishing parole, Fanfan Br. 29, as well as by limiting judicial authority to alter sentences after they have been pronounced and limiting good-time credits. See 18 U.S.C. 3624(b); Fed. R. Crim. P. 35(b) (1983). The abolition of parole would continue to serve that purpose regardless of whether the Court ultimately agrees with the government or respondents concerning the proper remedy in this case. Thus, although the government believed at the time of *Mistretta* that, if the Guidelines were invalidated, the provisions abolishing parole were inseverable, see 87-1904 & 87-7028 U.S. Br. 60-62, that is no longer the government's view.

congressional intent. The answer to that question is clearly no.

1. *Proportionality and uniformity.* Respondents agree that proportionality ("impos[ing] appropriately different sentences for criminal conduct of different severity," Guidelines § 1A1.1 editorial note (A)(3)), and uniformity ("narrowing the * * * disparity in sentences imposed * * * for similar criminal conduct by similar offenders," *ibid.*) were vital goals of the Sentencing Reform Act. Indeed, the two goals are tied together, because a system that consistently produces sentences that are proportional to the defendant's conduct necessarily will achieve the goal of uniformity as well.

a. Contrary to respondents' contention (Booker Br. 43 n.25), a great deal of the *substance* of the present Sentencing Guidelines rests on the premise that judges—not juries—would be responsible for finding facts relevant only to sentencing. See U.S. Br. 50. For example, the Sentencing Commission generally set base offense levels low, with increases for aggravating factors, based on the premise that consideration of multiple, potentially complex aggravating factors would be determined by judges by a preponderance of the evidence. See *id.* at 50-51. The central decision to carry forward traditional sentencing practice by making sentences turn on "real offense" factors was premised on judicial factfinding. See *id.* at 56-58; see also *Witte* v. *United States*, 515 U.S. at 403 (relevant conduct carries forward long-accepted recognition that "a particular offense should receive a more serious sentence within the authorized range if it was either accompanied by or preceded by additional criminal activity"). And Congress's authorization for upward departures based on factors not specified in the Guidelines, see 18 U.S.C. 3553(b), was similarly based on the premise of judicial factfinding. See U.S. Br. 56. If the judicial factfinding underlying all of those features of the Guidelines were deemed impermissible, the system would be distorted and would result in *non*-proportional sentences.

Respondents argue that one aspect of the distortion—the "asymmetry" between the government's burden to prove enhancements to a jury beyond a reasonable doubt and the defendant's burden to prove reductions to the court by a preponderance—is familiar in the criminal law and of no consequence. Fanfan Br. 40; Booker Br. 31. But legislatures shape the elements of criminal offenses with an awareness of the different burdens that must be borne by the government and the defendant, see *Patterson* v. *New York*, 432 U.S. 197 (1977), and tailor the substance of the provisions accordingly to ensure appropriate punishment. The Sentencing Guidelines were shaped under the premise that the government's burden of proving enhancements would be the same as the defendant's burden of proving reductions. To apply the existing Sentencing Guidelines with an asymmetrical burden of proof would necessarily result in distorted results that do not reflect the genuine intent of Congress or the Commission. Judicial factfinding is "essential" to the current Sentencing Guidelines system "as a whole." *Tilton* v. *Richardson*, 403 U.S. 672, 684 (1971).

b. Respondents argue that at least the goal of uniformity —the consistent treatment of like offenders—would be served by maintaining the Guidelines as binding sentencing rules with an overlay of jury factfinding. But the courts cannot pursue that ultimate legislative *goal* through procedural *means* that Congress never envisioned and did not provide for. See U.S. Br. 45, 59-63. The judicial lawmaking required is too ambitious and the impact on the federal criminal-justice system is too severe. The Sentencing Commission advises that, based on staff analysis of 2002 statistics, approximately 65% of federal criminal cases are projected to involve the application of sentence-enhancing Guidelines factors (other than prior convictions) that, under

respondents' view, would have to be submitted to the jury (absent a guilty plea that resolved those issues).[4]

Some of those cases could involve a large number of such potential enhancements, and many of the enhancements were not drafted to be suitable for jury use. See U.S. Br. 54-57. For example, one opinion sets forth a supplemental 20-page verdict form that the government believed would be required to obtain the findings necessary to apply the Guidelines in a multi-defendant drug case. See *United States* v. *Medas*, 323 F. Supp. 2d 436, 448 (E.D.N.Y. 2004) (after setting forth the proposed verdict form, observing that the relevant-conduct guideline alone is explained by "8 1/2 pages of single spaced Commentary and Application Notes relevant portions of which would surely be necessary to include in the jury's instructions if their findings were to be reliably informed"). This is not a criminal-justice process that Congress or the Commission ever devised, nor one the courts should unleash without a clear directive from Congress. Cf. *United States* v. *Jackson*, 390 U.S. 570, 579-580 & n.17 (1968); U.S. Br. 59-63. Until Congress can re-design a sentencing system in the light of this Court's new Sixth Amendment jurisprudence, the government's approach would at least *permit* judges to impose appropriate sentences, rather

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[4] While 97.1% of federal cases resulted in guilty pleas in the most recent year (2002) for which the Sentencing Commission data is available, see *2002 Sourcebook of Federal Sentencing Statistics* 20, that statistic is not an accurate predictor of the impact of applying *Blakely* to the Guidelines. In many pre-*Blakely* cases, pleas were based on the knowledge that courts would resolve disputed sentencing factors. But it is entirely unclear under respondents' proposals whether a defendant may enter a guilty plea to the statutory offense, while reserving a right to contest Guidelines enhancements before a jury; and, if so, whether the defendant has accepted responsibility under Guidelines § 3E1.1. This is one of the critical procedural conundrums created by applying *Blakely* to the Guidelines for which Congress (and the Commission) have provided no answer—and which the courts should not attempt to answer on their own. See U.S. Br. 59-63. The answer to that question, moreover, is critical to assessing how dramatic the impact of applying *Blakely* to the Guidelines would be.

than requiring them (especially in cases like the present ones) to impose sentences that, in the view of the Commission, would not "reflect the seriousness of the offense, * * * promote respect for the law, and * * * provide just punishment for the offense." 18 U.S.C. 3553(a)(2)(A).[5]

2. *Manageability.* Respondents argue that a system of jury factfinding under the present Sentencing Guidelines would be manageable, because "juries are fully equipped to handle the complicated factfinding" that would be required. Fanfan Br. 34. But if the Guidelines were applied with a judicially imposed jury-trial overlay, seemingly limitless new opportunities for litigation and uncertainty would be created as courts attempt to reduce complicated Guidelines factors to jury instructions and fill in the procedural gaps required to establish the new sentencing scheme. See U.S. Br. 61-62. The Court should not assume that Congress would have intended to impose those burdens on courts, the government, and defense attorneys. In fact, the Commission recognized

[5] Amicus NACDL (but not respondents) briefly asserts (Br. 19) that sentencing respondents within the range specified in the statutes under which they were convicted would "violate the Ex Post Facto Clause," because it "would substitute the higher statutory maximum for the lower Guidelines maximum to which respondents previously had a 'legal right' at the time of the offense." The Ex Post Facto Clause itself, however, would not apply to the Court's determination that respondents' constitutional challenge invalidates the Guidelines as binding rules but leaves Congress's statutory maximums intact. It "has long been settled by the constitutional text and [the Court's] decisions * * * that the Ex Post Facto Clause does not apply to judicial decisionmaking." *Rogers* v. *Tennessee*, 532 U.S. 451, 462 (2001). Moreover, even construed as a claim invoking due process fair-notice concerns, amicus's claim would have no merit. The burden of respondents' argument is that, although Congress purported to give them a legal right to a maximum term of imprisonment based on facts found by a judge under the Sentencing Guidelines, that scheme violated the Sixth Amendment. If their claim is correct, then they never had a "legal right" to be sentenced to no more than the Guidelines maximum. Moreover, at no time did respondents ever have reason to think that they would receive a sentence lower than the maximum Guidelines sentence for their primary conduct, without regard to charging decisions or which factfinder evaluated that conduct.

when it promulgated the Guidelines that introducing "[a] fact-finding process for sentencing decisions that has all the attributes of a formal trial could consume many times the resources devoted to the resolution of guilt or innocence" and "would render the sentencing process completely unworkable." United States Sentencing Commission, *Supplementary Report on the Initial Sentencing Guidelines and Policy Statements* ch. 6, at 45 (June 18, 1987). See U.S. Br. 55.

Respondents and their amici argue (Fanfan Br. 34-35; NACDL Br. 29) that some of the procedural obstacles can be overcome through the use of special interrogatories and bifurcated proceedings—mechanisms that are already used in federal capital cases. See 18 U.S.C. 3593(b). Capital cases require an enormous expenditure of resources by the government, the courts, and the defense bar. If capital-type procedures became commonplace in a significant set of routine criminal cases, the criminal-justice system could not function. Respondents argue (Fanfan Br. 35) that, since *Apprendi*, "juries have been charged with finding facts triggering the complex graduated sentencing scheme for drug offenses" under 21 U.S.C. 841(b). For most drugs, however, Section 841(b) creates a relatively simple three-tiered set of sentences depending primarily on drug quantity. Jury factfinding on Guidelines enhancements may implicate a vastly larger number of potential facts that are defined with far greater complexity and that invoke concepts such as "relevant conduct" that, if submitted to the jury at all, would bring the criminal trial far from its appropriate focus. See U.S. Br. 56-57.

B. Requiring Jury Factfinding Under The Guidelines Would Invite—Not Avoid—Serious Constitutional Doubt

Requiring the submission to a jury of Guidelines sentence-enhancing factors would raise serious constitutional doubts under long-recognized separation-of-powers principles and this Court's decision in *Mistretta*. The Court in *Mistretta*

recognized that "the unique composition and responsibilities of the Sentencing Commission give rise to serious concerns about a disruption of the appropriate balance of governmental power among the coordinate Branches." 488 U.S. at 384. But the Court ultimately concluded that there was no constitutional impropriety, in part because the Guidelines "do not bind or regulate the primary conduct of the public or vest in the Judicial Branch the legislative responsibility for establishing minimum and maximum penalties for every crime." *Id.* at 396. A determination that facts that enhance sentences under the Guidelines will be submitted to juries as elements with the upper bound of the Guidelines range functioning as a statutory maximum, however, would call the Court's premise in *Mistretta* into question. If facts that the Guidelines treat as sentence-enhancing are henceforth submitted to the jury, such facts will operate as the "functional equivalent" of elements of offenses under *Apprendi*. See 530 U.S. at 494 n.19. And the Commission would thus be defining crimes and the maximum punishment for such crimes through Guidelines never enacted by Congress. There is no constitutional precedent for creation of a non-legislative body whose sole function is to promulgate federal criminal law, on which Article III judges are appointed to serve. See U.S. Br. 64-65. Moreover, there is almost 200 years of precedent for the principle that establishing the elements of federal crimes is the province of Congress. See *United States* v. *Hudson*, 11 U.S. (7 Cranch) 32, 34 (1812).

Respondents argue that "[j]ury factfinding is not constitutionally doubtful," Fanfan Br. 38, and that the "procedural questions" of whether judge or jury must find sentence-enhancing facts "have nothing to do with" the separation-of-powers issue in *Mistretta*, *id.* at 39. That is not correct. While Congress could authorize jury factfinding at sentencing, the origins of the Guidelines have profound implications for judicially imposing them as elements of crimes that can henceforth be found by the jury. The conclusion that juries may find facts specified by the Sentencing Commission

would transform the Commission's work product into "elements"—and thus undermine the Court's premise in *Mistretta* that the Commission in regularizing sentencing was only performing a function "clearly attendant to a central element of the historically acknowledged mission of the Judicial Branch." 488 U.S. at 391. In short, while a system of determinate jury sentencing is one possible legislative response to a decision applying *Blakely* to the Guidelines, it is a response that must come from the legislature.

C. Employing The Guidelines As Advisory In A Limited Class Of Cases Is An Appropriate Remedy

The government's position is that, if *Blakely* applies to the Guidelines, in a case in which a sentence-enhancing factor (other than the fact of a prior conviction) would have to be submitted to a jury, the Guidelines would become merely advisory rules. Respondents argue that maintaining the Guidelines as binding rules for cases in which no Guidelines enhancements are applicable and thus no Sixth Amendment issue is raised, while rendering them advisory in cases like the instant cases, would create a "system [that] is so far beyond what Congress could have imagined that it must be rejected." Fanfan Br. 48; see Booker Br. 34-36. But if this Court reaches the remedial question at all, the resulting system will not be as Congress and the Commission imagined. Nonetheless, in cases without sentence-enhancing facts, the Guidelines can operate precisely as Congress and the Commission intended without implicating any Sixth Amendment issue. Thus, because *Blakely*'s Sixth Amendment rule casts no doubt on continued use of the Guidelines in cases in which no enhancing facts are applicable, the relevant statutes validly mandate the application of the Guidelines to such cases.[6] There is no warrant for invalidating the Guidelines

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[6] Contrary to respondents' contention, "a mere claim that a sentence-enhancing fact must be found," Booker Br. 35 n.21, would be insufficient to render the Guidelines non-binding. If the sentencing court in fact finds no such sentence-enhancing fact applicable, it can constitutionally apply the

across the board, even in cases without a Sixth Amendment issue. See, *e.g.*, *Sabri* v. *United States*, 124 S. Ct. 1941, 1948-1949 (2004) (facial constitutional challenges are discouraged). And, while the use of two different sentencing schemes would no doubt lead to less proportionality and uniformity in sentencing than the present system, so would each of the other remedial alternatives before the Court. Allowing the Guidelines to continue to be used as judicially administered sentencing rules where their constitutionality is unquestioned would better serve Congress's goals than jettisoning them in all cases. At the same time, forcing the Guidelines into a *Blakely* mold in cases like the present ones results in windfall sentences and a sentencing regime for the future that turns the Guidelines into an unworkable and constitutionally doubtful substitute for a revised criminal code.

Respondents criticize the fact that the government's remedy would "leav[e] in place as severable much of the [Sentencing Reform] Act itself—its elimination of parole, its statutory good time formula, supervised release, and its limitation of motions to modify a sentence to the prosecution's use." Booker Br. 34; see Fanfan Br. 48. But that is in keeping with the presumption in favor of severability. See *Regan* v. *Time, Inc.*, 468 U.S. 641, 653 (1984) (plurality opinion). The features of the Sentencing Reform Act to which respondents refer serve their valid and intended purposes independent of the validity of the Sentencing Guidelines. See note 3, *supra*. Accordingly, there would be no basis to invalidate the portions of the Sentencing Reform Act that put those features into place.

Respectfully submitted.

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Guidelines as written. The Guidelines would be rendered advisory only in cases in which the court would, absent Sixth Amendment concerns, impose a Guidelines enhancement based on a factual finding.